No. 12,045

IN THE

United States Court of Appeals

For the Ninth Circuit

HOWARD T. JENSEN,
Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California dismissing appellant's petition for writ of habeas corpus. (T. 38-39.) At the time the action was brought, the District Court had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A. Sections 451, 452 and 453, now superseded by Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the District Court dismissing the petition is now conferred upon this Court by Title 28 U.S.C.A., Section 2253, but at the time the notice of appeal was filed herein such jurisdiction was conferred by Title 28 U.S.C.A., Sections 463 and 225.

FACTS OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus in which he contended that his conviction under the Federal Kidnaping Act was void because the indictment by failing to charge that the victim was held for "ransom or reward", or for any reason, whatsoever, without describing the same, did not recite an offense against the United States (T. 1-32). The Court below issued an order to show cause (T. 33), and the appellee filed a motion to dismiss the petition on the ground that the same failed to state a cause of action (T. 34). The appellant then filed a reply to appellee's motion to dismiss (T. 35), and the matter was then submitted. Thereafter the Court below filed the following order dismissing the petition for writ of habeas corpus and discharging the order to show cause:

> "Petitioner, by this habeas corpus petition, seeks his release from respondent's custody on the ground that the trial Court was without jurisdiction to impose the sentence under which he is held. An order to show cause issued and the respondent has moved to dismiss the petition on the ground that it fails to state a cause of action upon which relief can be granted.
>
> "The pleadings disclose that the petitioner was indicted for a violation of the Kidnaping statute, 18 U.S.C.A. 409a, that he was tried by a jury and found guilty, and that he was represented by counsel throughout the proceedings. He now alleges that the indictment failed to charge an offense under the Federal Kidnaping Act for the

reason that the essential elements of the crime of kidnaping were omitted. The indictment charged the crime in the statutory language but omitted the phrase "and held for ransom or reward or otherwise." Whether the indictment is sufficient to charge an offense under a statute that is not claimed to be invalid is a question for the Court trying the issues under the indictment. *Goldsmith v. Sanford,* 132 F. (2d) 126. Habeas corpus is not a remedy to test such a question. *Knewel v. Egan,* 268 U.S. 442, *Kelly v. Johnston,* 128 F. (2d) 793 and cases cited therein. It follows, therefore, that respondent's motion to dismiss the petition must be granted and it is so ORDERED. Said petition is hereby DISMISSED and the order to show cause heretofore issued is hereby DISCHARGED.

"Dated June 9, 1948.

Michael J. Roche,
United States District Judge."

(T. 38-39.)

From this order appellant now appeals to this honorable Court (T. 40).

QUESTION INVOLVED.

Does the indictment fail to recite an offense against the United States?

THE INDICTMENT.

The indictment under attack herein by the appellant reads as follows:

"District of Utah:

Central Division: SS. The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Central Division of the District of Utah the November term of said Court in the year 1942, and inquiring for said District of Utah, upon their oaths present:

That heretofore, to-wit: on March 18, 1943, at Wendover, in the Central Division of Utah, a person, to-wit: Richard F. Dresher, Jr., was unlawfully seized, confined, kidnapped, abducted and carried away by

Delton Eugene Roper,
and Howard T. Jensen,

and that thereafter, to-wit: on March 18, 1943, said Dalton Eugene Roper and Howard T. Jensen, hereinafter called defendants, then and there, well knowing said Richard F. Dresher Jr., to have been seized, confined, kidnaped, abducted and carried away as aforesaid, unlawfully and feloniously did transport, cause to be transported and aid and abet in transportation, from Wendover, in the Central Division of the District of Utah, to a point about five miles west of Wendover, Nevada, and within the District of Nevada; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

A True Bill:
E. A. Bjorklund
Foreman of the Grand Jury

Dan B. Shields
United States Attorney

Filed: March 27, 1943."

THE STATUTE.

The Federal Kidnaping Act, 47 Stat. 326; 48 Stat. 781; 18 U.S.C.A. 408a, punishes any one who knowingly transports in interstate or foreign commerce "any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof."

ARGUMENT.

THE INDICTMENT DOES NOT FAIL TO RECITE AN OFFENSE AGAINST THE UNITED STATES.

The indictment is in the language of the statute, and as the Court below stated in its order, is sufficient against collateral attack on habeas corpus, citing *Goldsmith v. Sanford,* 132 F. (2d) 126; *Knewel v. Egan,* 268 U.S. 442; *Kelly v. Johnston* (CCA-9), 128 F. (2d) 793, cases on which appellee herein also relies. To the same effect see the case of *Telfian v. Johnston,* 122 F. (2d) 346, wherein this honorable Court made a similar ruling even though the indictment therein was far more defective than here (if this indictment can in any wise be considered defective, which appellee does not concede). See also a similar decision of this honorable Court in the case of *Stewart v. Johnston,* 97 F. (2d) 548.

The sufficiency of the indictment can be tested from the language of the indictment alone and if it appears therefrom that an offense over which this Court has

jurisdiction has been recited, no further inquiry can be made into the factual situation, which in effect is what appellant is trying to accomplish by way of habeas corpus. The gravamen of the offense is the interstate transportation of a person who has been unlawfully seized against his or her will. Such a recitation is set out in our indictment in question. The motive, or object, or purpose of the unlawful abduction is not, as appellant urges, an essential element of the crime, and failure to recite the same in the indictment obviously does not make it fatally defective. In *Chatwin v. United States,* 326 U.S. 455, 464, on which appellant herein, for some unexplainable reason, also relies, the Supreme Court said that the purpose of the Federal Kidnaping Act was to outlaw interstate kidnaping and that the essence of the crime of kidnaping is the "involuntariness of seizure and detention".

It should be pointed out here that in the original Federal Kidnaping Act there was a provision that the victim had to be kidnaped for "reward or ransom" in order to bring the case within the purview of the statute. But in 1934, as was pointed out by the Court in the case of *United States v. Parker,* 19 F. Supp. 450, affirmed 103 F. (2d) 857, Congress realized the inadequacies of such limitation and amended the statute by adding the words "or otherwise" after "ransom or reward". The Court also went on to say, and the appellant herein does not contend otherwise, that the "curious rule of ejusdem generis" can not logically be applied to the adverb "otherwise" and

that the "cases holding to the contrary seem to us lacking in grammatical understanding". In affirming the lower Court, the Court of Appeals for the Third Circuit, in *United States v. Parker,* supra, said at pages 860 and 861:

> "The statute prohibits the interstate transportation of persons kidnapped for other reasons than ransom or reward. It is not restricted to cases involving pecuniary benefit to the kidnappers. Gooch v. United States, 297 U.S. 124, 56 S. Ct. 395, 80 L. Ed. 522. We think that Congress by the phrase 'or otherwise' intended to include any object of a kidnapping which the perpetrator might consider of sufficient benefit to himself to induce him to undertake it."

In *Davis v. West,* 71 F. Supp. 377, the Court citing *United States v. Parker,* supra, with approval, said:

> "The indictment was returned under Section 408a, Title 18 U.S.C.A. The section is designed to punish one guilty of the transportation of a kidnapped person in interstate commerce where same is done for ransom or otherwise. The purpose and object of the transportation is but an incident of the kidnapping and the transportation of the person so kidnapped in interstate commerce. Whatever the motive of the accused, it is the purpose of the statute to punish for such kidnapping and transportation."

CONCLUSION.

In view of the foregoing it is obvious that the failure of the indictment to allege that the victim was held for ransom or reward, or for any reason, does not make it, as appellant contends, fatally defective, and thus subject to collateral attack. There is no authority to sustain the proposition which appellant advances; there is no merit in his position.

Accordingly, it is respectfully urged that the judgment of the Court below is correct and should be affirmed.

Dated, San Francisco, California,
November 19, 1948.

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United States Attorney,
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Assistant United States Attorney,
Attorneys for Appellee.